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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 855

WARREN G. WILLIAMS, JR., *Petitioner,*

v

SEABOARD AIR LINE RAILROAD COMPANY, *Respondent.*

REPLY BRIEF FOR PETITIONER

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Respondent's brief in opposition to Petitioner's application for writ of certiorari rather than meeting the important substantive issues raised by the Petitioner has devoted itself to a recitation of formalistic technical objections which upon close examination have little, if any, merit. The Respondent raises four arguments which can be summarized as follows:

First, the Petitioner did not properly and timely raise any Federal question in the court below and therefore has not complied with Rule 23-1(f) of the Court's Rules.

Second, closely related to that argument is the Respondent's contention that the judgment of the Supreme Court of Florida is based upon adequate non-federal grounds. Respondent states "the entire decision was not only based on non-federal grounds but no federal grounds were referred to nor discussed by the court." (Brief in Opp. at 9).

Third, the judgment sought to be reviewed is not final in that the Supreme Court of Florida merely reversed and remanded for new trial.

Fourth, the case presented to the Supreme Court for determination raises no questions of public importance.

The Petitioner will answer these arguments in the order set forth above.

I

Respondent in its brief in opposition takes issue with the Petitioner's Statement of the Case. Specifically, Respondent asserts that no constitutional issue was raised in the Supreme Court of Florida and that only in his Petition for Rehearing did the Petitioner raise a constitutional question. Respondent even felt it essential to have the Petition for Rehearing reproduced in its Appendix. (See Brief in Opp. pp. 4-5). Yet, this exception raised by the Respondent disregards the fact that at his first opportunity the Petitioner in his brief[1] to the Supreme Court of Florida raised clearly and precisely the constitutional issue of retroactive application of a recent decision which was implicit in the court's action, citing the applicable provisions of

[1] This brief was filed in March 1965 over two months prior to the Petition for Rehearing upon which the Respondent places so much emphasis.

the United States Constitution and numerous United States Supreme Court decisions. The Petitioner stated

> To allow the Defendant at this time to come in and re-argue the issue of the constitutionality of the Comparative Negligence Statute and its applicability to the case sub judice is, in effect, a denial of Plaintiff's rights as guaranteed by the due process and equal protection clauses of the Federal Constitution[2] and Section 12, Declaration of Rights, Florida Constitution. (Brief of Respondent at page 9).

The relevant portion of Petitioner's brief before the Florida Supreme Court is reproduced as Appendix A.

The Respondent further compounds its error by asserting that the issue was not timely or properly raised. This contention highlights the formalistic and incomplete nature of the Respondent's approach to the case. Examination of the very cases relied upon by the Respondent shows clearly that while it is perhaps unusual, a federal question may be properly and timely raised in a brief or argument in the court below. The Respondent cites *Live Oak Water Users' Asso-*

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[2] The Respondent railroad when it attempted to amend is assignment of errors in the appellate court to challenge the constitutionallity of the Florida statute and to take advantage of the recent *Seven-Up* case was itself injecting the federal constitutional issue of due process and equal protection upon which that decision rested.

It is important to note that the *Seven-Up* case was decided upon a federal ground, "that it is, therefore, invalid under the due process and equal protection clauses of the federal constitution and Section 12, Declaration of Rights, Florida Constitution. (See Petition for Cert. A 8, A 12). The Petitioner here challenges the *Seven Up* decision as contrary to the Federal Constitution and this Court's decisions. Clearly, as will be developed, infra at p. 8, the number of accidents and the need for protection represents a reasonable legislative classification which can not be overturned by passing references to the constitution of the United States. See Petition for Cert. at p. 9.

ciation v. *Railroad Commission,* 269 U.S. 354 (1925), for support. The Supreme Court in that case said:

> A claim merely presented to the Commission upon rehearing would not suffice to give us jurisdiction. *It must have been definitely brought to the court's attention.* [Petitioner's brief accomplished this purpose.] Although a copy of the request for rehearing addressed to the commission is annexed to the petition to the Supreme Court, *this petition made no claim under the Federal Constitution with sufficient definiteness for us to say the court's attention was challenged thereto.* Neither opinion shows that it considered or necessarily passed upon any such question. *Id.* at 357. (Emphasis added.)

Clearly the Petitioner in the case at bar brought the matter to the attention of the Florida Supreme Court and in his brief to the court focused with extreme care on the important constitutional questions involved. This was the first opportunity and the first place that the Petitioner could raise the question of deprivation of his constitutional rights. Indeed, it was the action of the Supreme Court of Florida in granting review and its later decision which is in issue. Cf. *Whitney* v. *California,* 274 U.S. 356, 362-363 (1926).

Even assuming arguendo that constitutional issues were first raised in the Petition for Rehearing, this Court has held that a federal issue is properly and timely raised in a petition for rehearing. See *Tidal Oil Co.* v. *Flanagan,* 263 U.S. 444 (1923); *Fleming* v. *Fleming,* 264 U.S. 29 (1924). Accordingly, Petitioner submits that the federal question was timely and properly raised in the court below.

II

Respondent also asserts that the case was decided on adequate non-federal grounds. Respondent has coupled this argument with the preceding one, that is, because there was no federal question timely raised the Supreme Court of Florida in deciding the case, did so upon adequate non-federal grounds. In Respondent's view this is clear, because the court did not even refer to any federal grounds. (See Brief in Opp. at p. 9). This argument can hardly be accepted when it is realized that the Petitioner challenged the Supreme Court of Florida to answer the question whether it would be a violation of his constitutionally protected rights to give retroactive effect to the recent *Seven-Up* decision (*Georgia Southern & Florida Railway Co.* v. *Seven-Up Bottling Co.*, 175 So.2d 39)[3] which was issued after his trial. Yet, the Supreme Court of Florida chose to ignore completely this vital question.

Certainly when the question of federally protected rights is involved, a court cannot simply ignore the question, unless of course, the issue is so well settled that the question is frivolous. For example, in *habeas corpus* proceedings and motions under 28 U.S.C. 2255 where constitutional issues are raised there has to be a hearing on the merits. *Grundler* v. *State of North Carolina*, 283 F.2d 798 (4th Cir. 1960); *United States* v. *La Vallee*, 279 F.2d 396 (2d Cir. 1960). If this

[3] It is interesting to note in this case that the personal injury aspect of the case was settled and the Plaintiff compensates for his injury. On a stipulated set of facts the Supreme Court of Florida declared unconstitutional the Florida comparative negligence statute as contrary to the equal protection and due process clauses of the Federal Constitution thus taking away Plaintiff's right under the statute *in personal injury cases.*

were the case, any challenge to state action could be mooted by the state court ignoring the federal question and deciding the matter on non-federal grounds. Certainly, a court cannot act in such a manner as to violate the fundamental concepts of due process. (See Petition for Cert. at p. 14).

III

The judgment sought to be reviewed *is a final order* which deprives the Petitioner of a federally protected right. The Respondent makes much of the fact that the order of the Supreme Court of Florida stated that the case is reversed and remanded for new trial. To be a final order does not necessarily mean the last possible order to be made in a case. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964).

Quoting Justice Black in *Gillespia, supra,* "the requirement of finality be given a practical rather than technical construction. . . . [I]n deciding the question of finality the most important competing considerations are the inconvenience and cost of piecemeal review on the one hand and the danger of *denying justice on the other.*" *Id.* at 152-153. (Emphasis added.)

If the Petitioner's case were returned to the trial court he would be effectively denied the right to raise the doctrine of comparative negligence and would be subject to the absolute defense that he was contributionally negligent. Indeed the doctrine of comparative negligence under which the first trial was conducted tacitly recognizes that there was some evidence of negligence on the part of the plaintiff since he was on the tracks. Accordingly the Petitioner would be

effectively barred from any recovery and would be irreparably injured.[4]

The Respondent relies on *Gospel Army* v. *City of Los Angeles,* 331 U.S. 543 (1947) to sustain its position. Yet even in that case this Court looked to whole record in determining the question of finality and the Petitioner asks the Court to do likewise in this case. In *Local No. 438* v. *Curry,* 371 U.S. 542 (1963), Mr. Justice White speaking for the Court, after careful examination of the entire record, rejected the contention that the order of the Georgia court overruling a demurrer was not a final judgment and said:

> The Georgia court's denial of this federal claim was held reviewable here although ordinarily the overruling of a demurrer is not a final judgment. . . . and concluded that for all *practical purposes* the litigation in the Georgia courts was terminated, since the *employee freely conceded he had no further defenses to offer in the state courts, ... Id.* at 551. (Emphasis added.)[5]

The Petitioner submits that the Florida Supreme Court having determined that the Comparative Negligence Statute is unconstitutional and having applied that determination retroactively, he is immediately and finally foreclosed from further meaningful litigation. Accordingly, the effect of the Supreme Court of Florida's decision is the death knell of the action and review should be allowed. *Cf. Eisen* v. *Carlisle & Jacquelin,* 370 F.2d 119 (2d Cir. 1966); See also

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[4] The legal doctrine of comparative negligence is the complete antithesis of the doctrine of contributory negligence. The former assuming the existence of negligence on the part of the plaintiff would still permit recovery.

[5] Cf. *Mercantile Nat. Bank* v. *Langdeau,* 371 U.S. 555 (1963).

Chabot v. *National Securities and Research Corp.*, 290 F.2d 657, 659 (2d Cir. 1961).

IV

The Respondent alleges that the Petitioner has not presented any important question for the Court's consideration, after all "only an average 127 people a year for six years [are] involved in grade crossing accidents in Florida."[6] This, without attempting to assess the value to be placed upon a human life, injury or suffering, would appear to be an appreciable number. (Brief in Opp. at p. 13.) This case presents not merely the problem of train accidents in Florida, and the loss of life and property in that state, see Appendices D 1-D 6 of Petition for Cert., but the loss of life and property in other states which have similar comparative negligence statutes. (See fn. 7 Petition for Cert. at p. 9). The decision of the Florida court which is here challenged affects all future actions and prospective plaintiffs who have been injured by a Florida railroad. This case raises not only the practical issue of the protection of human lives but the unresolved legal issue of what are the minimal constitutional standards for due process in state court proceedings.[7] Further, the Supreme Court of Florida has acted in a manner prohibited by the Constitution[8] in striking

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[6] This assumes that Respondent's figure is accurate. In fact, as disclosed by Appendix D1-D5 the number of people killed and injured ranges from a low of 169 in 1963 to a high of 199 in 1966.

[7] See *Broad River Power Co.* v. *State of South Carolina*, 281 U.S. 537 and Petition for Cert. at page 5.

[8] Compare *Hillock* v. *Heilman*, 201 So.2d 544 (Sup.Ct.Fla. 1967) in which the same Supreme Court refused to strike down a guest motorist statute asserting that any relief must come from the legislature.

down a valid legislative enactment and further in giving its determination retroactive effect to case already decided. *Cf. Forbes Pioneer Boat Line* v. *Bd. of Commissioners of Everglades Drainage District,* 258 U.S. 338 (1922). Judicial action of this sort affects not only this petitioner but the public generally.

CONCLUSION

For the reasons stated above, the Petitioner believes that it has raised important questions for this Court's determination in a proper and timely fashion and that he seeks relief from a final order of the Supreme Court of Florida. The Petitioner therefore requests that the Petition for Writ of Certiorari filed on November 24, 1967 be granted.

Respectfully submitted,

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